FILED

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No.

IN THE UNITED STATES SUPREME COURT

October Term 1997

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DANN FOX,

Petitioner,

v.

BANDAG, INC.,

Respondent

---

On Petition for Writ of Certiorari
to the United States Court
of Appeals for the Third Circuit

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# Petition for Writ of Certiorari and Appendix

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## Questions Presented for Review

A. Whether the district court has jurisdiction to modify a report and recommendation of a magistrate-judge denying summary judgment where the moving party does not object to the report.

B. Whether the court may impose on a civil RICO Plaintiff a greater burden in pleading fraud than is required of the United States in a criminal action in contravention of Sedima v. Imrex Company, Inc., 473 U.S. 479 (1985) and Durland v. United States, 161 U.S. 306 (1896).

## LIST OF ALL PARTIES TO THE PROCEEDING

The caption contains the names of all parties.

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## I. Citation to Reports of Opinions

The opinions of the District Court and Court of Appeal are not reported.

## II. Concise Statement of Grounds on Which Jurisdiction is Invoked

The date of judgment is July 30, 1997. An order denying rehearing was entered. Jurisdiction is conferred by 28 U.S.C. §1254.

## III. Statutes Involved

18 U.S.C 1343 states:

1343. Fraud by wire, radio, or television

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than five years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

Section 636(b)(1)(C) states:

(b)(1) Notwithstanding any provision of law to the contrary . . .

(C) the magistrate shall file his proposed findings and recommendations under subparagraph (B) with the court and a copy shall forthwith be mailed to all parties. Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate. The judge may also receive further evidence or recommit the matter to the magistrate with instructions.

IV. Concise Statement of the Case

A. Jurisdiction of the District Court

The Magistrate Judge recommended denial of two motions for summary judgment on the RICO count. The first report was objected to by both parties and the district court denied the objections and adopted the report.

The report recommending denial of the second motion for summary judgment was not objected to my the moving party, Bandag.

However, the District Court sua sponte rejected the report nine months later.

The matter was heard by the Magistrate Judge under 28 U.S.C. 636. Jurisdiction of the District Court and Court of Appeals to hear the appeal was conferred by 28 U.S.C. 636. The a district court had jurisdiction under 28 U.S.C. §1331, federal question jurisdiction.

B. Civil RICO fraud

The Plaintiff presented direct evidence of misrepresentations by Bandag to customers. Attached to this Petition is an excerpt from a recorded telephone conversation between John Way, Bandag's Manager of Fleet Services, Jim Cochrane, the buyer for Laidlaw Transit and Dann Fox. Mr. Way was in Muscatine, Iowa, Mr. Cochrane was in Burlington, Ontario, Canada and Mr. Fox was in Uniontown, PA. The representative of Bandag falsely tells his customer that, "There is no rebate on the BOND program."

The Magistrate Judge recognized that Laidlaw and other customers were ignorant of the availability of a rebate. See, Report and Recommendation dated January 3, 1996, Appendix. The magistrate judge also recognized that Bandag prohibited Plaintiff and other dealers from quoting lower prices to customers and from apprising certain BOND customers about its lower priced National Billing Program. Id. A copy of an excerpt the memo from Bandag to all BOND Dealers concerning the NationaLease contract. The memo describes a "volume bonus" of 1% available on the BOND Program.

## V. Argument

### A. The District Court lacks jurisdiction to modify a report and recommendation of a magistrate-judge denying summary judgment where the moving party does not object to the report.

There was no objection to the report of the Magistrate Judge recommending denial of the second motion for summary judgment.

Section 636 (b)(1)(C) provides in relevant part that:

> Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. **A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made.** A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate. The judge may also receive further evidence or recommit the matter to the magistrate with instructions.

(emphasis added).

Here, the District Court ignored the emphasized sentence. The District Court did not address the failure to object to the report and recommendation. The Court of Appeals in held that the District Court may accept, reject or modify, in whole or in part the findings or recommendations made by the magistrate. However, the Court has only the limited jurisdiction to make a determination at to those portion of the report that were objected to by a party. Otherwise, the sentence highlighted is meaningless.

B. The District Court may not impose on a civil RICO Plaintiff a greater burden in pleading fraud than is required of the United States in a criminal action in contravention of Sedima v. Imrex Company, Inc. 473 U.S. 479 (1985).

The Court of Appeals unpublished decision creates a more burdensome standard for alleging wire fraud than is required of the United States in criminal cases. Fraudulent conduct that will establish a scheme to defraud within the purview of the wire and mail fraud statutes includes knowingly making false representations, or concealing material facts that included statements made with reckless indifference as to their truth or falsity. In re: Phillips Petroleum Securities Litigation, 881 F.2d 1236 (3d Cir. 1989), citing, United States v. Sawyer, 799 F.2d 1494 (11th Cir. 1986), cert. den., sub nom. Leavitt v. United States, 479 U.S. 1069.

Under the analogous mail fraud statute a scheme or artifice to defraud need not be

fraudulent on its face, but must involve some sort of fraudulent misrepresentation reasonably calculated to deceive persons of ordinary prudence and comprehension. Kehr Packing v. Fidelcor, Inc., 926 F.2d 1406 (3rd Cir. 1991). **The scheme need not involve affirmative misrepresentations,** but the statutory term "defraud" usually signifies deprivation of something of value by trick, deceit, chicane or overreaching. Id. citing McNally v. United States, 483 U.S. 350, 107 S.Ct. 2875, 97 L.Ed.2d 292 (1987).

The Court of Appeals has in this commercial context added a requirement of affirmative misrepresentations. However, in the present case Plaintiff presents direct evidence of such misrepresentations and the Court of Appeals finds them insufficient.

The District Court held that the Plaintiff's claim was not sufficient to state a claim for fraud under the wire fraud statute. The District Court held that,

"Plaintiff has failed to adequately define the fraudulent scheme that defendant has allegedly conspired to pursue." See, District Court Opinion, Appendix.

The Court of Appeals affirmed. The Court of Appeals stated that, "Fox has presented no credible evidence that Bandag was engaged in a scheme to defraud is BOND customers or that Bandag made any affirmative misrepresentations to these customers." See Court of Appeals Opinion.

The Court of Appeals opinion on this point is erroneous in three ways. The Court of Appeals has added an additional requirement that there be an affirmative misrepresentation to constitute wire fraud. This contrary to this Court's decision in Durland v. United States, 161 U.S. 306 (1896), where this Court decided that the mail fraud statute reached beyond common law fraud and did not require an affirmative misrepresentation.

Secondly, the Court of Appeals ignored

the affirmative misrepresentations contained in the transcript of one of the interstate telephone conversations between Bandag's Fleet Manager, Plaintiff and a customer.

Thirdly, the Court of appeals states that "BOND customers . . . made fully informed decisions to join the BOND program." Essentially, the Court of Appeals has concluded that this scheme wasn't fraudulent in a commercial context because the customers are too smart to be defrauded. This is a conclusion that not even the District Court reached, and was refuted by the Magistrate Judge who cites the places in the record where the customers concede ignorance.

The Court of Appeals has impermissibly added a requirement of affirmative misrepresentations, a requirement which the Congress has not seen fit to include in the wire fraud statute. The Court has also, created a higher standard of pleading in civil RICO cases as compared to criminal

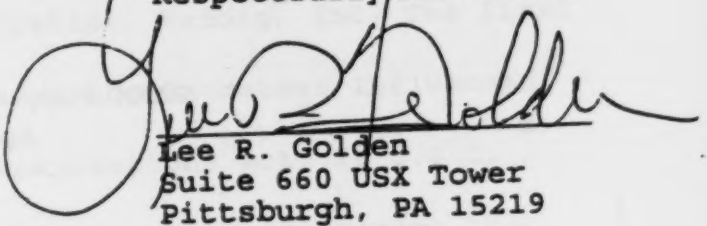
prosecutions. In the analogous criminal procedure, the quantum of evidence presented is more than sufficient to resist a motion to dismiss. The hostility of the District Courts to civil RICO actions has led to explicit and implicit decisions contrary to this Court's decision requiring liberal construction in Sedima v. Imrex Company, Inc., 473 U.S. 479 (1985). "The fact that RICO has been applied in situations not expressly anticipated by Congress does not demonstrate ambiguity, it demonstrates breadth." Id. There is nothing in the legislative history that indicates that Congress's intent for stricter construction of predicate acts in a civil action.

VI. Conclusion

Wherefore Petitioner requests that the

Court issue a Writ of Certiorari to the United States Court of Appeal for the Third Circuit.

Respectfully submitted,



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NOT FOR PUBLICATION

THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 96-3653

DANN FOX,
Appellant
v.

BANDAG, INC.,
Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA
(D.C. Civil No. 94-1271)
District Judge: Hon. Gary L. Lancaster

Submitted under Third Circuit LAR 34.1(c)
July 24, 1997

Before: SCIRICA and NYGAARD, Circuit Judges, and
DEBEVOISE, Senior District Judge
* The Honorable Dickinson R. Debevoise, Senior District Judge for the District of New Jersey, sitting by designation.

(Filed: July 30, 1997)

MEMORANDUM

OPINION

NYGAARD, Circuit Judge.

Plaintiff Dann Fox, appellant herein, filed an action [1] asserting two claims against the appellee, Bandag, Inc. The first was a claim under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. 1961 et seq., based on the allegation that Bandag had caused its dealer, Commercial Tire, to dismiss Fox from his job as a sales representative in order to prevent him from disclosing fraudulent sales techniques allegedly used by Bandag with some of its customers. The second claim was for tortious interference with prospective economic relations.

Fox pleaded that, following his dismissal by Commercial Tire, Bandag prevented three of its dealers from hiring him. The district court entered an order granting summary judgment for the appellee. We will affirm.

Appellant raises essentially the following issues:

1. Whether Bandag was entitled to summary judgment on plaintiff's RICO claim.

2. Whether Bandag is entitled to summary judgment on plaintiff's tortious interference claim.

3. Whether the district court lost its authority to award summary judgment to Bandag on plaintiff's RICO claim when Bandag failed to object to the magistrate judge's recommendation that summary judgment be denied.

4. Whether the district court abused its discretion by:
(a) denying plaintiff's motions to compel discovery; and (b) denying plaintiffs motion to supplement the appellate record with material neither submitted to, nor considered by, the

district court in connection with Bandag's summary judgment motions.

II.

Bandag is the developer of a commercially successful method for recapping truck and bus tires. Retreading services using the Bandag method, and the tread rubber and other materials needed for that purpose, are sold to truckers and bus companies in North America through a network of Bandag franchisees. Franchisees sell retreading services from specified locations, mostly on the basis of direct dealings with customers.

The BOND program is an alternative sales approach under which Bandag (as opposed to its franchisees) sells retreading services on a national basis, generally to large companies with nationwide or otherwise widespread operations. A BOND agreement

provides the customer with a specified price for retreading each type of tire that it covers, with the proviso that those prices will be honored by any BOND-certified Bandag franchisee.

The BOND customer agrees to have all of its tires retreaded (except in emergencies) at BOND-certified Bandag franchisees during the period covered by the BOND agreement. The work [3]
required under the BOND agreement is performed by BOND-certified Bandag franchisees chosen by the customer. Bandag bills the customer and collects payment, and Bandag bears responsibility for paying the franchisees for the work they have done.

The essence of the BOND program is that the prices under each BOND agreement are set by Bandag and the BOND customer alone, rather than in collaboration with one or more franchisees.

Part of the appeal of the BOND program from the customer's standpoint is that it assures the customer of a single price for retreading a particular type of tire by any BOND-certified franchisee wherever the customer has need, rather than leaving price-setting to negotiation between the customer (or its local depot) and one or more franchisees in a particular area.

Bandag maintains two other programs for national account customers. Under these programs, customers can receive coordinated national billing even though they negotiate prices for retreading services with individual franchisees on a location-by-location basis. In contrast to the BOND program, however, these other national billing programs do not offer guaranteed nationwide prices set by Bandag. Instead, each customer is left to negotiate price with any local franchisee while still

receiving the benefit of centralized billing.

Starting in April of 1990, Fox began to work as a salesman [4] for Commercial Tire, a Bandag franchisee in Pennsylvania. While there, Fox sought to compete for BOND customers by offering them a price that was less than the nationwide price already negotiated between Bandag and each respective customer. Fox specifically approached two BOND customers, Laidlaw and AIM

NationaLease, in an effort to get their local retreading business for Commercial Tire. He was unsuccessful and alleges that Bandag told him not to quote prices below the BOND price to Laidlaw, and not to send written price quotes to AIM NationaLease.

Representatives of Laidlaw and AIM NationaLease both testified that they were aware when they committed their companies to

the BOND program that lower prices for retreading services were available. They further testified that when they joined the BOND program, they had all the information that they felt they needed to make their decisions. Moreover, both representatives testified that they had no belief that they were defrauded by Bandag.

In the fall of 1992, Commercial Tire terminated its relationship with Fox. Fox claims that this was done because of pressure from Bandag, apparently in retaliation for Fox allegedly telling BOND customers that they could obtain lower prices than Bandag was making available to them under the BOND program, and

in an effort to prevent Fox from making such disclosures to other BOND customers in the future. However, in verified pleadings earlier filed against Commercial Tire in Pennsylvania state court, Fox alleged that

Commercial Tire fired him in order to avoid paying workers' compensation in connection with an on-the-job injury that he claims he suffered. Moreover, the secretary-treasurer of Commercial Tire has expressly stated in an affidavit that Bandag had nothing to do with Commercial Tire's decision to terminate Fox.

Fox alleges that after his termination by Commercial Tire he unsuccessfully sought employment with three Bandag franchisees in Florida. He ascribes the refusal of these franchisees to hire him to pressure from Bandag. Each of these franchisees denied in affidavits, however, that Bandag had played any role whatsoever in their decisions not to hire Mr. Fox. The only evidence submitted by Fox concerning Bandag's involvement was Fox's own averment of conversations he says he had with the franchisees.

There were primarily two discovery disputes below. The first related to interrogatories served by Fox asking Bandag to identify internal communications and contacts concerning himself, between Bandag and its dealers. The second regarded Fox's contention that Bandag was encouraging third-party witnesses to disregard deposition subpoenas Fox said he had issued.

With respect to the interrogatories, Bandag revealed [6] contacts active through the date the interrogatories were served, excluding contacts undertaken by or at the direction of counsel after litigation was initiated for the purpose of gathering information relating to the litigation. It supplemented its responses less than a month later. Fox disputed Bandag's privilege claim, and took the position that Bandag had a duty to supplement its responses further by disclosing contacts occurring after the

date the interrogatories were originally served. The magistrate judge ordered Bandag to supplement the responses "if possible," which Bandag then proceeded to do. Fox then challenged Bandag's supplemental responses, taking the position that inquiries by private investigators of persons acquainted with Fox should also have been disclosed. These contacts, according to Fox's own account, took place long after the litigation was commenced and were not with Bandag dealers. Moreover, there was no evidence that the investigators were Bandag employees. Fox's position was rejected.

The second discovery dispute related to calls made to Bandag by Bandag franchisees who were subpoenaed or otherwise contacted by Fox for discovery purposes. Some of Fox's discovery requests prompted franchisees to direct questions to Bandag's in-house

counsel in an effort to learn about what was going on. Bandag's in-house counsel, Frank Hill, submitted an uncontradicted [7] declaration describing in detail his conversations with dealers and customers who contacted him for information. Fox submitted nothing to dispute any aspect of Mr. Hill's version of these conversations.

III.

Following a period of discovery, Bandag moved to dismiss Fox's complaint for failure to state a claim upon which relief could be granted or, in the alternative, for summary judgment. Magistrate Judge Mitchell, to whom the motion was referred, recommended that the motion for summary judgment be granted with respect to the tortious interference claim, and denied with respect to the RICO claim.

Both parties objected to this recommendation. The district court adopted the recommendation over these objections.

Following further discovery, Bandag renewed its summary judgment motion on the RICO claim. Magistrate Judge Mitchell again recommended that the renewed motion for summary judgment as to the RICO claim be denied. Judge Mitchell believed that there was a question of fact as to whether Bandag had concealed the availability of lower pricing to certain of its BOND customers.

Judge Mitchell did not, however, find that there was any legitimate factual dispute as to whether Bandag had made any affirmative misrepresentation to any of its customers, nor did he [8] suggest that there was any competent evidence tending to prove that Bandag had made any such affirmative misrepresentations.

Neither party objected to the recommendation on the renewed motion.

Subsequently, Judge Lancaster, sue sponte, directed the parties to submit briefs on the question of Fox's RICO standing.

After oral argument, he issued a decision and order holding that Fox lacked standing to pursue any claim under RICO Sections 1962(a) through (c); that Fox had standing to pursue a RICO conspiracy claim under Section 1962(d); but that Fox's RICO claim was without merit on the undisputed facts in the summary judgment record, and hence, Bandag was entitled to judgment as a matter of law.

IV.

Appellant's contentions on appeal are meritless and require little explanation. First, we conclude that Fox's RICO claim was properly dismissed because his predicate-

fraud allegations were neither legally viable nor factually sustainable. Fox has presented no credible evidence that Bandag was engaged in a scheme to defraud its BOND customers or that Bandag made any affirmative misrepresentations to these customers. Moreover, Fox cannot establish a predicate-fraud violation through a fraudulent nondisclosure theory because Bandag had no duty to disclose the availability of lower prices to its customers as part of arm's-[9]length negotiations between a supplier and a customer. See Duquesne Light Co. v Westinghouse Electric Corp., 66 F.3d 604, 611-12 (3d Cir. 1995) ("[T]here is virtually no Pennsylvania case in which a defendant has been held to have a duty to speak when both the plaintiff and defendant were sophisticated business entities, entrusted with equal knowledge of the facts."). In

addition, Bandag's failure to disclose the availability of lower prices cannot possibly be said to be deceptive because, as the record demonstrates, the BOND customers that Fox alleges were lied to were fully aware that lower prices were available and made fully informed decisions to join the BOND program notwithstanding. See Kehr Packages, Inc. v. Fidelcor, Inc., 926 F.2d 1406, 1416 (3d Cir. 1991) (holding that non-disclosure cannot constitute mail fraud absent deception under RICO).

Second, Foxes tortious interference claim fails for a variety of reasons. Initially, we note that in his submissions to this court, Fox has failed to discuss his allegations that Bandag tortiously interfered with his actual employment at Commercial Tire and with his potential employment by three Florida Bandag dealers. As such, he has offered no credible evidence

to dispute the affidavits of the secretary-treasurer of Commercial Tire and the three representatives of the Florida franchisees which all flatly deny that Bandag played any role in their adverse[10] decisions concerning Fox's actual or potential employment.

Instead, Fox now appears to be alleging that Bandag tortiously interfered with his opportunity to persuade Bandag's BOND customers to buy retreading services through him rather than under the BOND program by preventing him from quoting lower prices to the BOND customers. This claim is similarly meritless.

For starters, Bandag had a justifiable interest in attempting to prevent a situation where its franchisees would be working at cross-purposes with Bandag's sale of its own goods and services. See Advent Systems Ltd. v. Unisys Corp., 925

F.2d 670, 673 (3d Cir. 1991). Second, Fox has produced no evidence demonstrating that prospective contractual relations were realistically at stake. See U.S. Healthcare v Blue Cross of Greater Philadelphia, 898 F.2d 914, 925 (3d Cir. 1990). Finally, Fox contends only that Bandag tried to prevent him from selling Bandag retreading services to customers on terms which violated contractual agreements between Bandag and its BOND customers, not that Bandag tried to stop him from selling competitive services to those customers, or from selling them services in accordance with the terms of Bandag's agreements with the customers.

Accordingly, Fox has failed to establish how Bandag's efforts to protect its own contractual rights prevented him from selling competitive retreading services to BOND customers. [11]

The remainder of Fox's contentions are frivolous. His challenge to the district court's discovery rulings fail because Fox received all discovery materials to which he was entitled,
and Bandag properly withheld information that was never requested and was subject to privilege.

Fox's contention that the district court lacked jurisdiction to reject or reconsider the magistrate judge's recommendation to deny Bandag's renewed motion for summary judgment because Bandag did not object is not supported by law. Henderson v Carlson, 812 F.2d 874, 878 (3d Cir. 1987) (Whether or not objections are made to the magistrate's report, under Section 636(b)(1)(C) the district court 'may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate.'").

Finally, Fox's request to supplement the appellate record is denied because: (1) he never presented the documents to the district court while the summary judgment motion was under consideration; (2) when he did offer them, he presented no evidence that they could not have been included in timely submissions before the discovery and summary judgment motions were decided; and (3) he offers no explanation as to how or why these additional documents are relevant to any matter now under review. [12]

V.

In summary, we have examined each of the issues raised by the appellant, and find them to be without merit. For all, but not limited to, the foregoing reasons, we will affirm.

TO THE CLERK:
Please file the foregoing not for publication opinion.
/s/Nygaard
Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

DANN FOX,

Plaintiff,

v.

BANDAG, INC.,

Defendant.

M E M O R A N D U M

Civil Action No. 94-1271

GARY L. LANCASTER,

District Judge October 7, 1996

Plaintiff alleges that defendant caused him to be discharged from his position as a tire salesman and precluded him from thereafter engaging in that profession in violation of Federal Racketeer Influenced and Corrupt rganizations Act, 18 U.S.C. Sections 1961-1968 ("RICO"). Before the court is defendant's renewed motion for summary judgment. For the reasons that follow, we grant the motion.

I. BACKGROUND

The material facts in this case are not in dispute.

Defendant is in the business of retreading truck and bus tires. It developed a unique and efficient method for retreading tires called the "Bandag method" and markets its method through authorized Bandag franchisees. Defendant sells, or otherwise provides, to its franchisees the material required to retread tires and instructs the franchisees in the Bandag method. Defendant has a large share of the retread tire market, with over 1,300 franchisees worldwide and 500 in the United States.

Although defendant's franchisees are its primary customers, it also has three national sales programs that provide retread services to national companies, such as Ryder and Laidlaw.

The sales program this case is concerned with is defendant's "BOND" program. ("BOND"

is an acronym for Bandag Oriented Dealer Network.) Under the BOND program, defendant contracts with national companies to provide retreading services at a uniform nationwide price.

Generally, the contracts are for a one year term. The BOND customers then obtain their retreading services at one of defendant's BOND certified franchisees. A BOND customer is free to choose which of defendant's BOND certified frranchisees it will use in a given area. Moreover, the local franchisees may compete with each other for BOND business from a given customer. The franchisees may not, however, compete with each other on the basis of price because the price is contractually set in the BOND agreement between defendant and the BOND customer. For the customer, the advantages of the BOND program are a

guaranteed set price nationwide and a single invoice for all of its purchases.

Defendant maintains two other programs for national account customers. Although the record is not clear, it appears that under these programs the customer can receive a single invoice for all of its purchases; however, neither of these two programs offers a guaranteed nationwide price. Rather, free to negotiate price with any local franchisee.

Starting in April of 1990, plaintiff began to work for one of defendant's franchisees, Commercial Tire, Inc., as a salesperson. While there, plaintiff sought to compete for BOND customers by offering several BOND customers a price that was less than the nationwide price already negotiated. As a result, plaintiff was told by defendant not to offer BOND customers a lower price, but to follow the nationwide

price already negotiated. Plaintiff also contends that defendant admonished him not to advise BOND customers that they might get better rates outside of the BOND program. Plaintiff alleges that because he refused to "play along" with defendant, defendant used its influence over Commercial Tire to have him discharged. Plaintiff further alleges that upon his discharge, defendant used its influence to prevent him from gaining employment with any of its other franchisees. This suit followed.

Plaintiff contends that defendant has violated RICO by prohibiting its franchises from offering lower prices to BOND customers. Plaintiff also seemingly contends that defendant violated RICO by failing to advise, and prohibiting its franchisees from advising, its BOND customers that more favorable rates might be available outside the BOND program.

## II . STANDARD OF REVIEW

To demonstrate entitlement to summary judgment, defendants, as the moving parties, are not required to refute the essential elements of the plaintiff's cause of action. Defendants need only point out the absence or insufficiency of plaintiff's evidence offered in support of those essential elements. Celotex v. Catrett, 477 U.S. 317, 322-23 (1986); Matsushita Electric Indust. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986). Once that burden has been met, plaintiff must identify affirmative evidence of record that supports each essential element of his cause of action.

Factual specificity is required of one who opposes a motion for summary judgment because summary judgment is designed to go beyond the pleadings to assess whether a genuine issue of material fact exists and

whether a trial is necessary. Therefore, in order to defeat a properly supported motion for summary judgment, a plaintiff cannot merely restate the allegations of his complaint, nor can he rely on self-serving conclusions unsupported by specific facts in the record.

Plaintiff must point to concrete evidence in the record that supports each essential element of his case. If plaintiff fails to provide such evidence, then he is not entitled to a trial, and defendants are entitled to summary judgment as a matter of law.

## III. DISCUSSION

### A. RICO Standing

Any person injured in his business or property by reason of a violation of RICO may recover treble damages and attorney fees. 18 U.S.C. Section 1964(c). In order to

recover, a plaintiff must establish two elements: (1) a RICO section 1962 violation; and (2) an injury to business or property by reason of such violation. Lightning Lube, Inc. v. Witco Corp., 4 F.3d 1153, 1187 (3d Cir. 1993). RICO section 1962 has four subsections that outline the acts it prohibits: subsections (a), (b), and (c) prohibit three types of substantive offenses, while subsection (d) prohibits conspiracies to violate any of subsections (a), (b), or (c). A plaintiff has standing to raise a claim under 1962 (a), (b), or (c) only if he has been injured in his business or property by the conduct constituting the violation. Restated, in order to have standing to bring a civil RICO claim under 1962(a), (b), or (c), plaintiff must allege injury directly caused by a predicate act of racketeering. Sedima. S.P.R.L. v. Imrex Company. Inc., 473 U.S. 479 (1985).

Here, plaintiff has failed to establish that he suffered an injury directly caused by an alleged predicate act of racketeering. On the contrary, plaintiff alleges that defendant caused him to be fired from Commercial Tire, Inc., and used its influence to prevent plaintiff from being hired by any of its other franchisees. Neither of these is a predicate act of racketeering. Defendant's alleged racketeering activities--the use of wire and mail fraud in implementing its BOND program--did not directly cause plaintiff to lose his job or prevent him from being rehired. Rather, the victims of the alleged racketeering activity were the BOND program customers only. Accordingly, we find that plaintiff does not have standing to sue defendant based upon defendant's alleged violations of sections 1962(a), (b), or (c).

As to the conspiracy claim, the Court of Appeals for the Third Circuit has interpreted RICO more broadly than the majority of the circuit courts of appeals, holding that to have standing under section 1962(d), plaintiff need allege only that his injury resulted from an overt act in furtherance of a RICO conspiracy, even though the overt act is not a predicate act. Shearin v. E. F. Hutton Group, Inc., 885 F.2d 1162 (3d Cir. 1989). As a result, a discharged employee has standing to sue under section 1962(d) if, as here, he alleges that his discharge was the employer's overt act in furtherance of a RICO conspiracy. This holds true even though discharge is not one of the predicate acts of racketeering activity listed under 18 U.S.C. Section 1961(1).

Accordingly, we conclude that plaintiff has standing to present a claim under section 1962(d).

B. RICO Conspiracy

Although we have held that plaintiff has standing to bring a claim under 1962(d), that is not dispositive of defendant's motion for summary judgment. If the substantive claims are deficient, a claim under section 1962(d) based on a conspiracy to violate one of the other subsections of section 1962 necessarily must fail. Lightning Lube, Inc. v. Witco Corp., 4 F.3d 1353, 1191 (3d Cir. 1993). Consequently, plaintiff must established that defendant conspired to violate one of those subsections. As a threshold matter, this requires proof that defendant agreed to engage in a "pattern of racketeering activity." Here, plaintiff proffers wire

fraud, 18 U.S.C. Section 1341, and mail fraud, 18 U.S.C. Section 1342, as the racketeering activity. To establish either mail fraud or wire fraud, plaintiff must establish that defendant participated in a scheme to defraud and knowingly used the mails and wires to further the scheme.

Plaintiff has failed to adequately define the fraudulent scheme that defendant allegedly conspired to pursue. Plaintiff proffers only the conclusory statement that "[t]he fraud is in maintaining a BOND program and preventing other presumably independent franchisees from quoting lower prices." See Plaintiff's Brief In Opposition to Motion for Summary Judgment, p. 8. By this statement, we understand plaintiff to allege that once defendant has negotiated a nationwide price with its BOND customer, it commits fraud if it refuses to permit its

local franchisees from offering a lower price to that same customer.

We fail to see how this constitutes a fraudulent scheme. On the contrary, it appears to present a sound business practice. Indeed, once defendant has negotiated the nationwide price with its BOND customer it is legally entitled to the benefit of the bargain. Plaintiff's theory that defendant acts fraudulently when it does not permit its BOND customers to disavow a negotiated nationwide price is without merit.

We find that plaintiff has failed to place on the record any evidence by which a jury acting reasonably could conclude that defendant's BOND program, either in theory or in actual practice, is a fraudulent scheme within the meaning of 18 U.S.C. Sections 1341 and 1342. Defendant's motion

for summary judgment will be granted. An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

| | | |
|---|---|---|
| DANN FOX, | ) | |
| Plaintiff | ) | |
| v. | ) | CA 94-1271 |
| | ) | |
| BANDAG, INC., | ) | |
| Defendant | ) | |

REPORT AND RECOMMENDATION

I. Recommendation:

It is respectfully recommended that the defendant's motion for summary judgment (Docket No. 77) be denied.

II. Report:

Presently before the Court for disposition is a renewed motion for summary judgment submitted by the defendant, Bandag, Inc. ("Bandag"). Fn 1

The plaintiff, Dann Fox, commenced this action alleging that he was employed as a salesman by Commercial Tire, Inc. ("Commercial"), a Bandag franchisee, and worked selling recap tires to national and local accounts; that he attempted to sell

the tires at a price which Bandag deemed too low, whereupon it persuaded Commercial to fire him by threatening to withhold recap materials from Commercial; and that Commercial discharged him and acted in concert with Bandag to "black ball" him from the tire industry.

The plaintiff contends that Bandag conspired with its franchisee Commercial and its network of franchised dealers to control prices, reduce competition and deprive him of-an opportunity to compete in the sale of retread tires . fn 2 These complained-of acts are said to constitute racketeering activity, in that they involved mail fraud in violation of 18 U.S.C. Section 1341 and wire fraud in violation of 18 U.S.C. Section 1343. Fn 3

Specifically, the plaintiff asserts that from 1990 through September of 1992, Bandag used the mail to process its "BOND account

customers" and conceal from them the availability of more favorable pricing. Fn 4 The plaintiff also avers that during said time period, Bandag official John Way used the telephone to call Commercial to have it prevent the plaintiff from quoting more favorable prices to national accounts, thereby maintaining Bandag's plan to quash competition among its independent franchise dealers. Fn 5 It is also alleged that from January of 1993 and continuing through that year, in furtherance of Bandag's scheme to prevent its dealers from quoting lower prices so as to compete for national accounts, Bandag utilized the telephone and computer in Muscatine, Iowa to inform its dealers in South Florida that if they hired the plaintiff, their franchises would suffer reprisals, such as losing rubber supplies. Fn 6

Thus, in his RICO claim, the plaintiff asserts that Bandag, through its BOND account program, engaged in a scheme to obtain higher profits through fraudulent marketing practices.

According to the plaintiff, Bandag concealed the availability of more favorable pricing from its BOND customers, failed to disclose its lower-priced National Billing program to BOND customers and forbid its dealers to quote lower prices to BOND customers.

Bandag argues that it did not conceal price information from BOND customers. Rather, in its instant motion, Bandag avers that those customers identified by the plaintiff as having been defrauded have testified that they knew Bandag offered programs with lower prices than BOND prices and deny that Bandag defrauded them.

With respect to Bandag customer AIM National Lease, the plaintiff avers that John Way, Bandag's Manager of Fleet Services, told him not to give AIM National Lease a written quote of a discounted price, although he was selling retread tires to Lake Erie National Lease at that discounted price. Fn 7 As for BOND customer Laidlaw, the plaintiff asserts that John Way forbid him from giving Laidlaw a written quote below the BOND price, that Bandag threatened to cancel Laidlaw from the BOND program if it made purchases outside the BOND program, and that Laidlaw was not told of the National Billing program. Fn 8

An officer of AIM National Lease testified that while he knew he could buy tires at a lower price from certain dealers by negotiating with them, no one ever informed him that other programs were available at Bandag. Fn 9 A representative

of Laidlaw testified that while he knew Bandag had a National Billing program that was different from the Bond program fn 10, he was not familiar with Bandag's other programs, did not know how they operate, and was not aware that a rebate existed on the BOND program. Fn 11

Neither AIM National Lease nor Laidlaw believe Bandag defrauded them. Fn 12 Still, the record shows that no one informed AIM National Lease of other pricing programs that were available at Bandag. Likewise, Laidlaw was not informed of the differences in Bandag's pricing programs and was unaware that a rebate existed on the BOND program. Further, Bandag forbid the plaintiff and other dealers from quoting lower prices to customers and from apprising certain BOND customers about its lower-priced National Billing program. Fn 13

Summary judgment is appropriate where there are no material factual issues in dispute and the movant is entitled to judgment as a matter of law. F.R.Civ.P. 56(c); American Flint v. Beaumont, 62 F.3d 574 (3d Cir. 1995). Based on the foregoing, a material question of fact exists as to whether Bandag concealed from its customers the availability of more favorable pricing.

Therefore, for the reasons set forth above, it is recommended that the defendant's instant motion be denied.

Within ten (10) days after being served with a copy, any party may serve and file written objections to this Report and Recommendation. Any party opposing the objections shall have seven (7) days from the date of service of objections to respond thereto. Failure to file timely objections may constitute a waiver of any appellate rights.

Respectfully submitted,

ROBERT C. MITCHELL, Chief
United States Magistrate Judge

Dated: January 3, 1996

1. On December 28, 1994, Bandag filed a motion to dismiss for failure to state a claim or, in the alternative for summary judgment (Docket No. 17). This motion was granted as to the claim that Bandag interfered with the plaintiff's business relations (Count II of the complaint), but it was denied as to the claim that Bandag violated the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. Section 1961 et seq. ("RICO") (Count I). See, Report and Recommendation dated March 8, 1995 (Docket No. 37) which was adopted as the opinion of this Court

per Order dated April 10, 1995 (Docket No. 42). Thereafter, in an Order dated April 25, 1995, the Court granted Bandag's motion for a limited reopening of discovery into aspects of the plaintiff's RICO claim (Docket No. 44). After completion of that discovery, Bandag filed its instant motion.

2. See, plaintiff's RICO Case Statement at Paras 2 and 14.

3. Id. at Para. 5a.

4. Id. at Para. 5b(1) and 5c(1). It appears that "BOND" is an acronym for "Buyer Oriented Network of Dealers".

5. Id. at Para. 5b(2), 5c(2) and 5g.

6. Id. at ,, 5b(3) and 5c(3).

7. See, the plaintiff's affidavit, attached as exhibit 1 to his Appendix to Brief in Opposition to (Bandag's first motion for) Summary Judgment Volume 1.

8. Id.

9. See, deposition of Terry DiMascio at p. 22.

10. See, deposition of Jim Cochrane at p. 31.

11. Id. at pp. 70-72.

12. See, DiMascio deposition at p. 22 and Cochrane deposition at p.31.

13. See, the plaintiff's affidavit.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

| | | |
|---|---|---|
| DANN FOX, | ) | |
| Plaintiff, | ) | |
| vs | ) | C A No. 94-1271 |
| BANDAG, INC., | ) | |
| | ) | |
| Defendant, | ) | |

REPORT AND RECOMMENDATION

I. Recommendation:

It is respectfully recommended that the defendant's motion to dismiss, or in the alternative, for summary judgment (Docket No. 17) be granted as to Count II and denied in all other respects.

II. Report:

Presently before the Court for disposition is a motion to dismiss for failure to state a claim, or in the alternative, for summary judgment submitted by the defendant, Bandag, Inc. ("Bandag"). Fn 1

The plaintiff, Dann Fox, commenced this action alleging that he was employed as a salesman by Commercial Tire, Inc. ("Commercial") and sold recap tires to national and local accounts; that he attempted to sell the tires at a price which Bandag deemed too low, whereupon it persuaded Commercial to fire him by threatening to withhold recap materials from Commercial; and that Commercial discharged him and acted in concert with Bandag to "black ball" him from the tire industry.

The plaintiff contends that by attempting to control the pricing of retread tires, and by preventing him from competing in the sales of such tires, Bandag has engaged in wire fraud and mail fraud in violation of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. Section 1961 et seq. ("RICO") (Count I) and has interfered with his business relations

(Count II). The plaintiff has invoked the Court's Jurisdiction pursuant to 28 U.S.C. Section 1331 and its supplemental jurisdiction.

Bandag has moved to dismiss the complaint for failure to state a claim, or in the alternative, for summary judgment.

With respect to the RICO claim in Count I, Bandag asserts that the plaintiff has failed to set forth allegations of fraudulent conduct with sufficient particularity. Alternatively, it arrgues that if the plaintiff has stated a viable RICO claim, such claim is without merit.

Rule 9(b) of the Federal Rules of Civil Procedure mandates that "all averments of fraud or... circumstances constituting fraud... shall be stated with particularity."

Pursuant to Court Order dated September 8, 1994, the plaintiff submitted a "RICO

Case Statement" wherein he avers that Bandag conspired with its franchisee Commercial and its network of franchised dealers to control prices, reduce competition and deprive him of an opportunity to compete in the sale of retread tires. Fn 2 These complained-of acts are said to constitute racketeering activity, in that they involved mail fraud in violation of 18 U.S.C. Section 1341 and wire fraud in violation of 18 U.S.C. Section 1343. Fn 3

Specifically, the plaintiff asserts that from 1990 through September of 1992, Bandag used the mail to process its "BOND account customers" and conceal from them the availability of more favorable pricing. Fn 4 The plaintiff also avers that during said time period, Bandag official John Way used the telephone to call Commercial to have it prevent the plaintiff from quoting more favorable prices to national accounts,

thereby maintaining Bandag's plan to quash cmpetition among its independent franchise dealers. Fn 5

It is also alleged that from January of 1993 and continuing through that year, in furtherance of Bandag's scheme to prevent its dealers from quoting lower prices so as to compete for national accounts, Bandag utilized the telephone and computer in Muscatine, Iowa to inform its dealers in South Florida (such as Jim Delph at Roundtree Tire, Jim Coogan at GTS Tire and Jeff at Palm Beach Bandag), that if they hired the plaintiff, their franchises would suffer reprisals, such as losing rubber supplies. Fn 6

As to RICO then, the plaintiff is claiming that Bandag, through its BOND account programs, Fn 7 engaged in a scheme to obtain higher profits through fraudulent marketing practices, i.e., by concealing

from its BOND customers the availability of more favorable pricing. The plaintiff also asserts that in furtherance of said scheme, Bandag conspired with its franchise dealers to black ball him from the tire industry because he sought to quote more favorable prices to its customers. While the plaintiff also alleges that Bandag's actions obstructed competition, it is clear that alleged antitrust violations are not predicate acts under RICO. See, 18 U.S.C. Section 1961; Jennings v. Emry, 910 F.2d 1434, 1438 (7th Cir. 1990).

The Third Circuit has explained:

> Rule 9(b) requires plaintiffs to plead with particularity the 'circumstances' of the alleged fraud in order to place the defendants on notice of the precise misconduct with which they are charged, and to safeguard defendants against spurious charges of immoral

> and fraudulent behavior. It is certainly true that allegations of 'date, place or time' fulfill these functions, but nothing in the rule requires them. Plaintiffs are free to use alternative means of injecting precision and some measure of substantiation into their allegations of fraud.

Seville Industrial Machinery Corp. v. Southmost Machinery Corp., 742 F.2d 786, 791 (3d Cir. 1984). Where an allegation of fraud adequately describes the nature and subject of a fraud-based offense, Rule 9(b) is satisfied. Id. furthermore, a liberal standard should be used in construing RICO complaints due to the remedial nature of the RICO statute. Sedima v. Imrex Co., 473 U.S. 479, 497-98 (1985).

Here, allegations that Bandag engaged in mail fraud and wire fraud to conceal the availability of more favorable pricing and conspired with its dealers to prevent the plaintiff's hiring are stated with sufficient particularity to place Bandag on notice of the nature and subject of the racketeering charge.

RICO renders liable "any person" who uses or invests income derived "from a pattern of racketeering activity" to acquire an interest in or to operate an enterprise engaged in interstate commerce, Section 1962(a); or who acquires or maintains an interest in or control of such an enterprise "through a pattern of racketeering activity", Section 1962(b); or who, being employed by or associated with such an enterprise, conducts or participates in the conduct of its affairs "through a pattern of racketeering activity", Section 1962(c); or,

who conspires to violate the three subsections above, Section 1962(d). H.J. Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229 (1989).

In his RICO Case statement, the plaintiff is asserting claims pursuant to 1962(a)(b) and (d) and in the alternative, Section 1962(c). fn 8 . Section 1962(a) "is directed specifically at the use or investment of racketeering income, and requires that a plaintiff's injury be caused by the use or investment of income by the enterprise." Brittingham v. Mobil Corp., 943 F.2d 297, 303 (3d Cir. 1991). Under this section, an injury resulting from the investment of racketeering income must be distinct from an injury caused by the predicate acts themselves. Lightning Lube, Inc. Van Witco Corp., 4 F.3d 1153, 1188 (3d Cir. 1993). While the plaintiff alleges that Bandag received income from its high margin

direct billing BOND programs" fn 9, he has not alleged that his injury was "specifically linked to the use or investment of income in any named enterprise." See, Kehr Packages, Inc. v. Fidelcor, Inc., 926 F.2d 1406, 1411 (3d Cir), cert. denied, 111 S.Ct. 2839 (1991). As such, Section 1962(a) cannot be a basis for liability here. Id.

Section 1962(b) of RICO prohibits a person from acquiring an interest in or control of an enterprise through a pattern of racketeering activity. To state a claim under Section 1962(b), a plaintiff must allege "a specific nexus between control of a named enterprise and the alleged racketeering activity." Kehr, supra, 926 F.2d at 1411, citing Shearin v. E.F. Hutton Group, Inc., 885 F.2d 1162, 1168 n.2 (ad Cir. 1989).

The plaintiff has stated such a claim by identifying two separate enterprises, Bandag and the Bandag Dealer Network (which is said to be composed of Bandag's franchisees), and alleging that Bandag controls its Dealer Network. Fn 10 The plaintiff asserts that by controlling its Dealer Network, Bandag has prevented its dealers from quoting lower prices or bidding on national accounts, such that it receives the benefit of a high margin national account program; fn 11; that through its control of the Dealer Network, Bandag has artificially increased the prices paid for retread commercial tires in both domestic and foreign markets fn 12, and has used mail and wire communications to falsely state that other billing programs were unavailable to customers fn 13; and that it used its Dealer Network to prevent him from being hired. Fn 14

While the plaintiff has alleged the commission of at least two predicate offenses involving mail fraud and/or wire fraud, he must still show Outhit the racketeering predicates are related, and that they amount to or pose a threat of continued criminal activity." H.J. Inc., supra, 492 U.S. at 240 (emphasis in original). Alleged racketeering predicates are related if they have "the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events."
Id. (citations omitted). They amount to continued criminal activity where it is shown that related predicate acts extend over a substantial period of time, Id. at 242, or project into the future with a threat of repetition. Id. at 241.

Here, Bandag's alleged acts of fraud appear to be related since their common purpose was to conceal the availability of more favorable pricing from BOND customers and to prevent its dealers from quoting better prices to those customers. Likewise, these alleged acts would amount to continued criminal activity, since the plaintiff has alleged that such acts extended over a two year period. Thus, under Sedima, the plaintiff has set forth the requisite pattern" of racketeering.

With respect to the plaintiff's "fraudulent marketing" claim, Bandag argues that there is no evidence that its BOND account program or any other aspect of its administration is fraudulent. It asserts that the plaintiff cannot show that the BOND program involves the making of any false or misleading statement to either its dealers or customers.

The record shows that the purpose of Bandag's Bond program is to accommodate large fleet operators who are demanding single transaction, nationwide procurements for their retread requirements. Fn 15 Under the BOND program, Bandag contracts with large companies, many of whom have several locations, for the purpose or providing them with consistent retreading services at specified prices. Fn 16

Bandag has approximately 50 BOND customers located throughout the United States. Fn 17 The terms of Bandag's BOND agreements are usually for twelve months, and pricing under the agreements is individually negotiated with each customer, as are details about services required and tires to be used. Fn 18 Under the BOND agreements, companies agree to obtain their retreading services from BOND-certified Bandag dealers at prices specified in the

contract. Fn 19 In that respect, the BOND program differs from Bandag's National Billing program, in that under the latter program, dealers may offer various prices for their services, and customers may select the best available price. Fn 20

If a franchise dealer elects to become Bond-certified so as to service a BOND customer, it is required to charge only those prices which are specified in the customer's BOND agreement. Fn 21 According to Bandag, if one of its franchisees procured retreading business from a BOND customer on terms other than those specified in the BOND agreement, that customer would have breached its contract with Bandag.

It is the plaintiff's position that Bandag failed to disclose its lower-priced National Billing program to BOND customers fn 22 He also avers that Bandag forbid its dealers to quote lower prices to BOND

customers. Fn 23 The plaintiff asserts that because he sought to offer lower prices to Bandag customers, Bandag threatened his employer, Commercial, with reprisals if it did not fire him. Fn 24 In addition, the plaintiff has testified that after Commercial discharged him in the fall of 1992, Bandag spoke with other tire dealers in South Florida and persuaded them not to hire him. Fn 25

Summary judgment is appropriate where there are no material factual issues in dispute and the movant is entitled to judgment as a matter of law. F.R.Civ.P. 56(c); Travitz v. Northeast, 13 F.3d 704 (3d Cir. 1994). Based upon the record, material questions of fact exist as to whether Bandag, in conjunction with its Dealer Network, concealed from its customers the availability of lower pricing, and whether it engineered the plaintiff's

discharge in furtherance of this alleged scheme. Thus, the instant motion should be denied as to Count I.

With respect to the plaintiff's tortious interference with business relations claim in Count II, Bandag argues that such claim cannot lie, as it had a legitimate, commercial interest in protecting itself and its franchisees from the plaintiff's tactics of quoting false prices to BOND customers.

Pennsylvania recognizes the tort of intentional interference with existing contractual relations and also the tort of intentional interference with prospective cbontractual relations. U.S. Healthcare v. Blue Cross of Greater Philadelphia, 898 F.2d 914, 925 (3d Cir. 1990). Fn 26 To support a claim for interference with existing contractual relations, a plaintiff must show: (1) the existence of one or more contracts; (2) a purpose or intent to harm

the plaintiff by preventing the completion of said contractual relation(s); (3) conduct by the defendants which is improper as a matter of law; and (4) actual harm resulting from the defendants' actions. Silver v. Mendel, 894 F.2d 598, 604-605 (3d Cir. 1990), cert. denied, 110 S.Ct. 2620 (1990), citing, Adler, Barish, Daniels, Levin and Creskoff v. Epstein, 393 A.2d 1175, 1183 (Pa. 1978), cert. denied, 442 U.S. 907 (1979).

The plaintiff alleges that because he was offering lower-priced tires to its customers, Bandag interfered with his existing employment contract with Commercial by persuading it to fire him. Assuming that was true, Bandag's alleged actions would be justified on grounds that it sought to protect its interests in the BOND program and BOND agreements which it believed were impaired by the plaintiff's illicit pricing.

See, Nathanson v. Medical College of Pennsylvania, 926 F.2d 1368, 1388-89 (3d Cir. 1991) (where the Court, applying Pennsylvania law, quoted the district court's ruling that 'reinforcing or complying with one's own valid contract does not constitute unjustifiable interference with another's contract. An action to protect one's contractual right is also ordinarily justification for interference with another's contract"); also see Advent Systems Did. v. Unisys Corp., 925 F.2d 670, 673 (3d Cir. 1991) (defendant may "protect some legitimate concern that conflicts with an interest of the plaintiff"); Menendez v. Beech Acceptance Corp., 521 So.2d 178, 180 (Fla.App.3 Dist. 1988) ("conduct engaged in for legitimate purposes, even if tinged with animosity and malice, does not give rise to a cause of action for interference with a contractual relationship").

Since the plaintiff admits that he quoted lower prices to BOND customers while working at Commercial, Bandag's alleged interference with his contract was justified, so as to protect its contractual rights under the BOND agreements. Thus, the plaintiff has failed to state a claim for interference with existing contracts.

In addition, the plaintiff has not shown that Bandag intentionally interfered with prospective contractual relations. Fn 27 To prove such a claim, a plaintiff must show: (1) a prospective contractual relationship; (2) a purpose or intent

to harm the plaintiff by preventing the relationship from occurring; (3) the absence of privilege or justification on the part of the defendant; and (4) the occurrence of actual damage. Silver, supra, 894 F.2d at 602.

The first element of this tort, "a prospective contractual relationship", has been defined as 'something less than a contractual right, something more than a mere hope." U.S Healthcare, supra, 898 F.2d at 925, quoting, Thompson Coal Co. v. Pike Coal Co., 412 A.2d 466 (Pa. 1979). It is "a reasonable probability" that contractual relations will be realized. Id. There must be a showing that a particular contract or express offer was being contemplated by a plaintiff and/or third party which was improperly impeded by the defendant's action. See, Silver, supra, 894 F.2d at 602 (plaintiff specified several contracts and bids that were in the negotiating or drafting phase); Glenn v. Point Park College, 272 A.2d 895, 897-899 (Pa. 1971) (appellants specified that an offer had been made for a particular property).

Here, the plaintiff has failed to show that a particular agreement or offer was at stake. Rather, he avers that he sought to apply for employment at Roundtree Tire, GTS Tire and Palm Beach Bandag, but they refused to accept an application. Fn 28 Thus, as to this claim in Count II, Bandag is entitled to judgment as a matter of law.

Therefore, for the reasons set forth above, it is recommended that the defendant's motion to dismiss, or in the alternative, for summary judgment be granted as to Count II and denied in all other respects.

Within ten (10) days after being served with a copy, any party may serve and file written objections to this Report and Recommendation. Any party opposing the objections shall have seven (7) days from the date of service of objections to respond thereto. Failure to file timely objections

may constitute a waiver of any appellate rights.

Respectfully submitted,

ROBERT C. MITCHELL,

Chief United States Magistrate Judge

Dated: March 8, 1995

1. 1. The plaintiff alleges that Bandag is the largest supplier of recap tire materials and machines in the world, and that Commercial is a Bandag franchisee.

2. See, RICO Case Statement at Para. 2 and 14.

3. Id. at Para. 5a.

4. Id. at Para. 5b(1) and 5c(1). We note that under the mail fraud statute, a scheme to defraud need not be fraudulent on its face, nor involve affirmative misrepresentations, so long as it involves "some sort of fraudulent

misrepresentations or omissions reasonably calculated to deceive persons of ordinary prudence and comprehension". Kehr Packages Inc. v. Fidelcor, Inc., 926 F.2d 1406, 1415 (3d CIr. 1991), cert. denied, 111 S.Ct. 2839 (1991).

5. Id. at Para. 5b(2), 5c(2) and 5g.

6. Id. at ,, 5b(3) and 5c(3).

7. It appears that "BOND" is an acronym for "Buyer Oriented Network of Dealers").

8. Id. at Para. 1.

9. Id. at Para. 11a.

10. Id. at Para. 6a.

11. Id. at Para. 6(b) and 9.

12. Id. at Para. 10.

13. Id. at Para. 2.

14. Id. at Para. 8.

15. See, plaintiff's exhibit 6, attached to appendix (Vol. I).

16. See, deposition of David Maslow at pp. 14-19.

17. See, affidavit of Frank B. Hill at Para. 3.

18. Id. at Para. 5.

19. See, Maslow deposition at pp. 18-19.

20. Id. at pp. 15-16.

21. Id. at p. 17.

22. See, plaintiff's affidavit at pp. 1-2, and plaintiff's deposition at p. 122.

23. See, plaintiff's affidavit at pp. 1-2, and plaintiff's deposition at pp. 60-61, 69-75, and 78.

24. See, plaintiff's deposition at pp. 105-107.

25. Id. at p. 126, 135-164. We note that in Shearin, supra, 885 F.2d at 1168-70, the Third Circuit held that an employee's firing, while not racketeering activity itself, could constitute a RICO injury if it was done

to further a Section 1962(d) conspiracy. "Predicate acts for conspiracy do not of necessity consist of section 1961(1) racketeering activity." Id. at 1169. To adequately plead a RICO conspiracy, a plaintiff must set forth allegations "that address the period of the conspiracy, the object of the conspiracy, and the certain actions of the alleged conspirators taken to achieve that purpose." Id. at 1166. An allegation that an employee was fired in furtherance of a Section 1962(d) conspiracy states a claim for relief under RICO. Id. At p. 1170. Here, a liberal reading of the RICO Case Statement at I, 2, 5b(1-3) and 14 would appear to satisfy such requirement.

26. The parties have not asked the Court to engage in a choice-of-law analysis for purposes of this claim. Bandag cites to both Pennsylvania and Florida law in its moving papers, while the plaintiff relies only upon Pennsylvania law in opposing the instant motion.

27. Prospective contractual relations identified by the plaintiff include potential employment relations with Bandag franchisees Roundtree Tire, GTS Tire and Palm Beach Bandag.

28. See, plaintiff's deposition at pp. 138-139.

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

FOX,

Appellant,

v. 96-3653

BANDAG, INC,

Appellee

Petition for Rehearing In Bank denied.